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No. 03-1472

Supreme Court, U.S.
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In The
Supreme Court of the United States

LOCAL UNION NO. 38, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

against

ANTHONY PELELLA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

A. Factual background

This case grows out of petitioner Local 38's efforts to force respondent Anthony Pelella to pay a fine imposed by the Union following a Union hearing on whether Pelella performed contracting work in violation of Union rules. The trial in Federal court established that the Union had egregiously violated Pelella's statutory due process rights, and the jury awarded him $25,000 in punitive damages and nominal compensatory damages on his counterclaim.

Pelella was an apprentice member of Local 38, Sheet Metal Workers' International Association, AFL-CIO. In October 1998, Local 38's business representative, Nicholas Colombo, Sr., charged Pelella with improperly working for a Local 38 contractor. The written charges did not allege when or where Pelella had committed this infraction, the number of hours in question, or even that the work was covered by the union contract. (SA 34, 109).[1]

Procedural irregularities infected the in-house Union "trial." Pelella was not notified in advance that he could remove two members of the trial committee. (SA 108-09). Nor was he "advised of his procedural rights to be represented by counsel and present evidence." (Pet. App. 57) (hereinafter "___a"). The charging party's brother was trial committee chairman and the charging party's son was also on the trial committee. (58a, SA 112). As Magistrate Judge George A. Yanthis held post-trial, the jury was "entitled to

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[1] SA-___ refers to the Supplemental Appendix in the Court of Appeals. JA-___ refers to the Joint Appendix.

conclude that *the hearing provided to Pelella was a mockery* given the fact that two members of the trial committee were related to the charging party." (58a) (emphasis supplied).

Local 38's Trial Committee found Pelella "guilty" for having wrongfully worked 208 hours. This figure was wholly lacking from the written charges or the trial itself, and first appeared in the Trial Committee's post-trial "findings." *Compare*, SA 112 (findings) *with* SA 108-09 (charges). Moreover, "there was trial evidence that the Local 38 trial committee presented the membership with a misleading account of Pelella's trial rebuttal prior to the membership voting to affirm the decision." (58a). Local 38's Trial Committee fined Pelella $4,418 and removed him from his employer, a decision upheld by the union membership after the Trial Committee falsely reported that Pelella had admitted guilt. (4a; SA 112-116).

B. Proceedings in the district court

Local 38 initiated this lawsuit to collect the fine against Pelella, who counterclaimed under the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411, for violation of his statutory due process rights in connection with the disciplinary proceedings. (5a).

Claiming that an "interested employer" financed the counterclaim, the Union moved for summary judgment, arguing that the LMRDA precludes employer-financed

counterclaims. (5a-6a). Pelella disputed that an interested employer financed the counterclaim. (SA 81-82).[2]

After the district court denied summary judgment on the ground that the LMRDA does not prohibit employer-financed counterclaims, the case went to trial. The jury rejected Local 38's claim against Pelella, and returned a verdict in Pelella's favor on his due process counterclaim, awarding him $1.00 in nominal damages and $25,000 in punitive damages. (7a).

Resolving petitioner's post-trial motions, Judge Yanthis held that the jury could "make an award of punitive damages even if they found that Pelella failed to establish actual damages." (56a). *See also*, 57a ("[t]he objectives and rationale of punitive damages differs from actual damages" and "parties who engage in malicious or reckless violations should not escape the punitive or deterrent goals of punitive damages merely because either good fortune or a plaintiff's unusual strength or resilience protected the plaintiff from suffering harm"). The district court further held that "there was ample evidence in the record for the jury to determine that punitive damages were justified."

> Here, the jury was entitled to conclude based upon the trial evidence that the charges served on him by Local 38 were woefully inadequate and did not provide him with the specificity required by the statute. Pelella testified that he was not

[2] As Judge Straub noted in dissent, if this Court rejects the Second Circuit's interpretation of § 101(a)(4), this case should be remanded to the district court for a trial on whether an "interested employer" actually financed the counterclaim. (32a).

advised of his procedural rights to be represented by counsel and present evidence. The jury was also entitled to conclude that the hearing provided to Pelella was a mockery given the fact that two members of the trial committee were related to the charging party. Moreover, there was trial evidence that the Local 38 trial committee presented the membership with a misleading account of Pelella's trial rebuttal prior to the membership voting to affirm the decision.

The Court concludes that there was sufficient evidence at trial from which a reasonable jury could conclude that punitive damages were warranted. Simply stated, the jury had sufficient evidence before it to conclude that Local 38 acted with a callous disregard or indifference to the rights of Pelella. In addition, the Court concludes that the $25,000 awarded by the jury was reasonable in amount given the purposes of punishing flagrant conduct and deterring similar conduct in the future. (57a-58a).

C. The Second Circuit appeal

In a decision reported at 350 F.3d 73 (2d Cir. 2003), the Second Circuit affirmed the district court, holding that the LMRDA does not preclude interested employers from financing counterclaims. Adopting the analysis from the only other court decision addressing this issue, the Second Circuit noted the statute expressly precludes interested employers only from financing "any such actions," which refers to the right of a union member "to institute an action in any court." (10a-11a) (citing *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Company*, 496 F.2d 1 (7th Cir. 1974)). Common

usage defines "action" as the filing of a complaint, not a counterclaim. (11a-13a).

The Court of Appeals further noted that Congress wanted "to protect unions from harassing litigation and illegal management interference with their internal disputes with dissident workers." (17a). Those concerns have less force when the union sues a member and introduces an outside actor into the internal grievance, opening the door "to some measure of interference." (17a). If anything, the Court reasoned, denying union members the assistance from interested employers so they may protect themselves would represent a further abuse of power that the LMRDA was intended to prevent. (17a-18a).

REASONS FOR DENYING CERTIORARI

This Court will only grant certiorari for compelling reasons, including a conflict with a decision of another Circuit or to review an opinion that "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of the Court's supervisory power." Sup.Ct.R. 10.

Petitioner seeks review on three issues: (1) whether the LMRDA permits employer-financed counterclaims; (2) whether punitive damages are permissible without economic harm and (3) whether the LMRDA permits punitive damages. This Court should deny certiorari.

POINT I

AS THERE IS NO CIRCUIT SPLIT ON THE SECOND CIRCUIT'S INTERPRETATION OF SECTION 101(a)(4) OF THE LMRDA, CERTIORARI IS UNWARRANTED

Petitioner concedes there is no Circuit split on the question of whether § 101(a)(4) of the LMRDA prohibits employer-financed counterclaims. (Pet. at 3). As the district court observed, "there is scant case law regarding the application and interpretation of [the] second proviso" of § 411(a)(4). (49a). The only courts to have even addressed this issue – the Seventh Circuit and the Second Circuit – have resolved the issue similarly, holding that interested employers *may* finance counterclaims under the LMRDA. As the Second Circuit adopted the reasoning in *International Brotherhood of Electrical Workers, Local 336 v. Illinois Bell Telephone Company*, 496 F.2d 1 (7th Cir. 1974), petitioner cannot even identify a difference in the way Federal courts have analyzed this issue. As there is no split among the Circuits and this narrow issue arises sparingly, Supreme Court intervention to address this obscure issue is unnecessary.

POINT II

THE SECOND CIRCUIT PROPERLY INTERPRETED FEDERAL LAW IN HOLDING THAT SECTION 101(a)(4) DOES NOT PROHIBIT EMPLOYER-FINANCED COUNTERCLAIMS

Certiorari is unwarranted because the Second Circuit properly interpreted § 101(a)(4) of the LMRDA. There is no reason for Supreme Court involvement when the Court of Appeals has employed non-controversial methods of

statutory construction and legislative history in holding that interested employers may finance counterclaims under the statute.

"The language of the statutes that Congress enacts provides 'the most reliable evidence of its intent.' For that reason, we typically begin the task of statutory construction by focusing on the words that the drafters have chosen. In interpreting the statute at issue, 'we consider not only the bare meaning' of the critical word or phrase 'but also its placement and purpose in the statutory scheme.'" *Holloway v. United States*, 526 U.S. 1, 6 (1999) (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)).

Under 29 U.S.C. § 411(a)(4), union members may

> institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, . . . Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

The statute further provides that "no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance or petition." *Id.*

The Court of Appeals interpreted the above provision to distinguish between employer-financed *suits* initiated by union members and employer-financed *counterclaims*.

The Circuit deemed persuasive the Seventh Circuit's analysis that "the language Congress chose prohibits the financing of 'any such action,' which refers back to the right of a member to 'institute an action in any court.'" (11a) (citing *Local 336*, 496 F.2d at 3). The Second Circuit properly held that "in the statutory context of section 101(a)(4), the word 'action' is qualified by the phrase 'to institute.'" (11a-12a) (citing *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Simply put, "[a] party institutes an action when he commences a judicial proceeding." (12a) (citing *inter alia*, *McNeil v. United States*, 508 U.S. 106, 112 (1993) ("[T]he normal interpretation of the word 'institute' is synonymous with the words 'begin' and 'commence'")). Moreover, while "[a]n action is . . . instituted when a plaintiff files a complaint . . . in sharp contrast, a defendant asserts a counterclaim in response to a plaintiff's institution of an action. A counterclaim, by definition, is a 'claim for relief asserted against an *opposing party after* an *original* claim has been made.'" (12a) (citing, *inter alia*, Fed.R.Civ. P. 3 and *Moore's Federal Practice* § 13.90 (2)(a), at 13-70 (7th ed. 1997) (emphasis in original). Accordingly, the Second Circuit concluded, since "a defendant does not 'institute' an action when he asserts a counterclaim . . . [s]ince section 101(a)(4)'s second proviso limits a union member's right to 'institute an action,' the plain language of the statutory text, when read literally, does not circumscribe a member's right to pursue a counterclaim because the assertion of a counterclaim does not 'institute an action.'" (13a) (citing *Local 336*, 496 F.2d at 4).

Other provisions in § 411(a)(4) further suggest Congress did not intend to restrict employer-financed counterclaims. The statutory language references the sort of activity that a *plaintiff* would undertake, *i.e.*, naming the

labor organization "as defendants or respondents," "exhaust[ing] reasonable hearing procedures" and "instituting legal or administrative proceedings against such organizations or any officer thereof." 29 U.S.C. § 411(a)(4). The proviso addressing employer-financed claims also references plaintiff activity, *i.e.*, "any such action, proceeding, appearance or petition." *Id.* As these are not activities associated with defendants, the statute only contemplates that employers cannot finance lawsuits, not counterclaims.

Legislative history supports this statutory interpretation. The Court of Appeals reasoned that "[c]onstruing section 101(a)(4) broadly to preclude a union member from asserting a counterclaim financed by an interested employer where the union instituted an action against the member would not further the purpose of the LMRDA." (15a).

Congress intended the "right to sue" provision under § 101(a)(4) to curb abuses of power and corruption by union officials. (15a). *See generally*, *Hall v. Cole*, 412 U.S. 1, 7-8 & n.12 (1973). Congress also sought "to give union members the tools to insure the effective and fair operation of their union as a representative institution." (15a-16a) (quoting *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. National Right to Work Legal Defense and Education Foundation*, 590 F.2d 1139, 1149 (D.C. Cir. 1978)). Congress did not want "interested employers" to interfere with the disputes between unions and their members or to "cause harassing suits or otherwise to create divisions in the unions with which they had relationships." (17a) (quoting *National Right to Work*, 590 F.2d at 1151).

However, the policy reasons against allowing interested employers to finance lawsuits by union members do not apply where "a union affirmatively subjects an internal union dispute to litigation in a court of law." (17a-18a). As the Second Circuit reasoned, when the union sues a member, it "introduces the outside actor into what once had been an internal grievance and opens the door to some measure of interference." *Id.* Moreover, the concerns against allowing interested employers to "cause harassing suits" or "create divisions" between unions and their members are mitigated where the union has already sued a member. *Id.* "If anything, denying members the ability to secure resources from interested employers so that they can protect themselves under these circumstances – where the union invokes judicial assistance to enforce disciplinary charges and the fines that result therefrom – may leave the members vulnerable to the same abuses of union power that the LMRDA seeks to remedy." (18a).

The Second Circuit underscored its analysis by noting the language prohibiting interested-employer counterclaims is a proviso, which must be interpreted narrowly. "A proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment." (18a) (citing *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929, 931 (2d Cir. 1942)). *Shilkret* cites settled Supreme Court authority, *Spokane & Inland R.R. v. United States*, 241 U.S. 344, 350 (1916) and *Dollar Savings Bank v. United States*, 19 Wall. 227, 336 (1873). Strictly interpreting the proviso "better comports with Title I's purpose of protecting union members from abusive union practices and, at

the same time, does not undermine the intent of the second proviso." (18a).

As Congress has not amended the pertinent portion of the statute in the wake of the Seventh Circuit's holding in *Local 336*, decided 30 years ago, Local 38 cannot persuasively argue that the Second Circuit erred in adopting the reasoning in that case. While Congress amended the definitions portion of the Act in 1978, it did not repudiate *Local 336* by, for example, more broadly defining "action" in the second proviso to include counterclaims. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard, Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 580 (1978).

Without any contrary precedents supporting its position, Local 38 resorts to policy arguments and the dissenting opinion in seeking certiorari. These arguments do not warrant Supreme Court intervention.

First, Local 38 argues that legislative intent should trump the plain meaning of the LMRDA. (Pet. at 6) (the Second Circuit "adopted a narrow, literal, 'plain meaning' construction of the second proviso. The majority opinion misconstrued the sweeping intent of the second proviso"). However, "[t]he starting point in statutory interpretation is 'the language [of the statute] itself.' The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances,' when a contrary legislative intent is clearly expressed." *Ardestani v. INS*, 502 U.S. 129, 135-136 (1991). While petitioner claims "there is no warrant for [the Second Circuit's] reasoning in the legislative

history" (Pet. at 7), the union bears the burden of showing that Congress intended a result that deviates from the plain statutory language. Local 38 has cited no legislative history concerning whether "interested employers" can finance counterclaims. While the union argues that the Second Circuit's interpretation ignores a "bedrock rule of Federal Practice" that claims and counterclaims are generally treated similarly (Pet. at 7), the plain language of the statute in issue must trump general practice rules which, understandably, do not address the practical implications of allowing interested employers to finance counterclaims in certain labor disputes.[3]

Nor does the dissenting opinion warrant certiorari. While Judge Straub suggested that the majority's interpretation would narrow the rights under § 101(a)(4) and thus fail to "protect[] union members from discipline by unions for asserting counterclaims" (45a), the majority noted that this policy argument "is not implicated in this appeal." (19a). "As Justice Frankfurter noted, 'an exact formulation of the issue before us is necessary to avoid inadvertent pronouncement in one context when the language may require separate consideration in other settings.'" (19a) (citing *Automatic Canteen Co. of America v. F.T.C.*, 346 U.S. 51, 65 (1953)). In rejecting the dissent's hypothetical concerns, the panel further observed that in the 30 years since the Seventh Circuit first resolved this

[3] Local 38 relies on the Second Circuit's interpretation of a bankruptcy statute which equates claims with counterclaims. (Pet. at 4-5) (citing *Koolik v. Markowitz*, 40 F.2d 567 (2d Cir. 1994)). However, the Court noted that *Koolik* "turned on an interpretation of 11 U.S.C. § 362(a)," which "generally must be construed broadly." (18a n.5).

issue, no union has ever tried to limit the rights of its members in a manner envisioned by Judge Straub.

> Although the LMRDA was enacted in 1959, we are aware of no cases in which a union has argued that the text set forth in the main body of section 101(a)(4) allows a union to limit the rights of its members to assert a counterclaim. This is telling with respect to how section 101(a)(4) has been understood in the nearly 30 years since the Seventh Circuit held that the phrase 'to institute an action,' as those words were referred to in the second proviso, did not encompass the assertion of a counterclaim. In the decades after the Seventh Circuit arrived at that decision, there is no record of a single court holding that unions could limit the rights of their members to assert counterclaims against them in light of the terminology employed by section 101(a)(4). In essence, despite the fears expressed by the dissent, there is no persuasive evidence to suggest that parties and courts believe unions may limit the rights of their members to assert counterclaims. (19a-20a).

Petitioner articulates no reason for this Court to grant certiorari on the proper interpretation of § 101(a)(4) of the LMRDA. There is no Circuit split on the obscure issue of whether "interested employers" may finance counterclaims, and the Second Circuit cited legislative intent and sound policy reasons in rejecting Local 38's position.

POINT III

PETITIONER HAS WAIVED ANY ARGUMENT THAT PUNITIVE DAMAGES ARE CONSTITUTIONALLY IMPERMISSIBLE WITHOUT ECONOMIC HARM, AND THIS ISSUE IS WELL-SETTLED IN ANY EVENT

"It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. . . . [T]his is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). Relatedly, a petitioner cannot seek certiorari on an issue that it expressly waived in the lower court. *City of Springfield v. Kibbe*, 480 U.S. 27, 259 (1987). That is what petitioner does here.

While petitioner asserts that respondent cannot recover punitive damages without economic harm (Pet. at 8), the Second Circuit observed that petitioner waived this argument.

> [T]he district court instructed the jury that it could award punitive damages even if the jury found that Pelella failed to establish actual damages. At oral argument, Local 38 conceded that the union did not object to the instruction. In the absence of such an objection, Local 38 . . . may not seek to alter the jury award by arguing that punitive damages cannot be recovered in the absence of actual damages. (24a).

To the extent Local 38 challenges the punitive damages as "excessive," it has waived that argument, as well.

(27a-28a). The Second Circuit noted that "the union never argued [to the district court] that the punitive damages award was constitutionally excessive. Local 38 therefore failed to preserve that challenge for appellate review." (27a). *See also*, 56a-58a. The Circuit correctly rejected Local 38's argument that *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003) – decided during the course of Local 38's appeal – altered this Court's due process analysis concerning punitive damages, therefore allowing Local 38 to challenge them as "excessive" for the first time in its appellate reply brief. (27a-28a). The Second Circuit noted that, seven years before *Campbell*, this Court established due process parameters for punitive damages in *BMW of North America v. Gore*, 517 U.S. 559, 583 (1996). (27a-28a). *Campbell* merely applied *Gore's* three-factor test for assessing punitive damages. 538 U.S. at 418. Accordingly, the Second Circuit held that Local 38 waived this argument by "fail[ing] to raise such a challenge with the court below." (28a). This Court should not grant certiorari to resolve an issue that petitioner waived in the courts below.

In any event, it is well-settled that "economic harm" is not a necessary predicate for punitive damages. While the *Campbell* plaintiffs recovered $1 million in compensatory damages solely for emotional distress and suffered no economic harm, this Court held they were entitled to punitive damages even if the $145 million award was excessive. 538 U.S. at 413-14, 419, 426. This reasoning belies Local 38's assertion that "where no economic harm has been suffered, punitive damages are constitutionally impermissible." (Pet. at 10).

To the extent petitioner argues that punitive damages may not be awarded without compensatory damages, that

argument is not supported by this Court's holdings in *Gore* and *Campbell*. In assessing whether punitive damages are excessive, *Gore* examined "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." 538 U.S. at 418. *Gore* cautioned that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards. . . . [and] a higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582. *Campbell* echoed this cautionary rule. 538 U.S. at 425.

In the wake of *Gore* and *Campbell*, courts have held that ratios are not a useful means to assess punitive damages where the jury awards only nominal compensatory damages. *See*, *Lee v. Edwards*, 101 F.3d 805, 811 (2d Cir. 1996) ("The Supreme Court's observations in *Gore* reinforce that view: violations of civil rights may very well be 'particularly egregious' acts that result in only 'a small amount of economic damages' or injuries whose monetary value is 'difficult to determine.' Because the compensatory award here was nominal, *any* appreciable exemplary award would produce a ratio that would appear excessive by this measure") (emphasis in original); *Williams v. Kaufman County*, 352 F.3d 994, 1016 n.76 (5th Cir. 2003) ("As the instant case concerns the ratio between punitive and nominal damages, *Campbell*'s discussion of the proper ratio between punitive and compensatory damages is inapposite to our consideration today"). There is no reason for this Court to remand to the Second Circuit to consider whether punitive damages were appropriate in the absence of any economic harm. (Pet. at 13).

Moreover, even if ratios apply in cases with nominal compensatory awards, *Gore* and *Campbell* counsel that the appropriate ratio is between the punitive damages and the *potential* harm to plaintiff. The evidence at trial established that Local 38 caused Pelella significant potential, if not actual, harm through its wrongful conduct, subjecting him to disciplinary action, stigma among the Union membership and emotional harm while egregiously violating his due process rights and making an affirmative misstatement to the Union membership that Pelella had admitted guilt. Pelella also testified that Local 38's actions contributed to his temporary separation from his wife. While the monetary value of Pelella's noneconomic harm, or potential harm, was "difficult to determine," the jury's $25,000 punitive damages award was not disproportionate to that harm.

Petitioner does not consider the consequences of its suggestion that punitive damages are inappropriate without economic damages. Various civil rights violations simply lack any corresponding economic harm to the victim. This includes censorship in violation of the First Amendment, unlawful arrests, fair housing violations and, as here, due process violations. Without punitive damages, tortfeasors are not deterred from violating the law. *Compare, Carlson v. Green*, 448 U.S. 14, 22 n.9 (1980) ("Punitive damages may be the only significant remedy available in some § 1983 actions where constitutional rights are maliciously violated but the victim cannot prove compensable injury"). As petitioner has not articulated any sound policy reasons to upset the principle that juries may award punitive damages in the absence of compensatory damages, certiorari is unwarranted.

POINT IV

PETITIONER HAS WAIVED ANY ARGUMENT THAT PUNITIVE DAMAGES ARE NOT AVAILABLE UNDER THE LMRDA, AND THERE IS NO CIRCUIT SPLIT ON THIS ISSUE

This Court "ordinarily will not decide questions not raised or litigated in the lower courts. That rule has special force where the party seeking to argue the issue has failed to object to a jury instruction, since Rule 51 of the Federal Rules of Civil Procedure provides that '[no] party may assign as error the giving . . . [of] an instruction unless he objects thereto before the jury retires to consider its verdict.'" *Kibbe*, 480 U.S. at 259.

In seeking certiorari, Local 38 argues for the first time in this litigation that punitive damages are not available under the LMRDA. In its post-trial motion, Local 38 claimed the evidence did not support punitive damages and that this relief could not be awarded without actual damages. (56a-58a). On appeal, Local 38 abandoned the former argument, pressing only the latter. (23a-28a). In its *en banc* petition to the Second Circuit, Local 38 only argued that punitive damages are impermissible without economic harm. Perhaps most importantly, at trial, Local 38 raised no objection to the jury instructions on punitive damages. By not advancing its present argument at any point in the proceedings below, Local 38 has waived this issue.

In any event, despite Local 38's attempt to manufacture a Circuit split, the Federal courts are in agreement that the LMRDA permits punitive damages. Petitioner argues that the Fourth Circuit has rejected punitive damages in LMRDA cases. (Pet. at 13-16) (citing *United*

Mine Workers v. Patton, 211 F.2d 742, 749 (4th Cir. 1954)). However, *Patton* does not interpret the LMRDA. It reviews a different (but similarly-titled) statute, the Labor Management Relations Act (LMRA), 29 U.S.C. § 187(b). *Patton* did not address the LMRDA, and Local 38's extensive quotes from that case concern the legislative history of the LMRA, not the LMRDA.

Each Circuit to address the issue holds that punitive damages are available under the LMRDA. *See, International Brotherhood of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir. 1968); *Morrissey v. National Maritime Union*, 544 F.2d 19, 25 (2d Cir. 1976); *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815, 820 (9th Cir. 1976); *Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Eng'rs, AFL-CIO*, 579 F.2d 1373, 1380 (8th Cir. 1978); *Quinn v. Diguilian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Doty v. Sewall*, 908 F.2d 1053, 1062 (1st Cir. 1990) and *Thompson v. Office and Professional Employees Int'l Union, AFL-CIO*, 74 F.3d 1492, 1509 (6th Cir. 1996).

Title I of the LMRDA does not specify the relief available for violations of the Act. Instead, it authorizes federal courts to award "such relief . . . as may be appropriate." 29 U.S.C. § 412. Congress did not specify the available remedies to avoid the "'danger that those remedies not listed might [thereby] be proscribed with the result that the courts would be fettered in their efforts to grant relief according to the necessities of the case.'" *Hall*, 412 U.S. at 11. In *Hall*, this Court characterized § 102 of the LMRDA "as a broad mandate to the courts to fashion 'appropriate' relief." *Id.* at 11. For this reason, even without express statutory authority, courts may award attorneys' fees to LMRDA claimants. *Id.* at 14.

The Courts of Appeal have applied this reasoning in holding that the LMRDA permits punitive damages. *See, e.g., Quinn*, 739 F.2d at 649-51. They have uniformly rejected Local 38's argument that punitive damages are *per se* appropriate. Instead, they have relied upon the district courts' discretion to ensure that punitives are permitted only in appropriate cases and with the same limitations generally applicable to these awards. *See, id.* (punitive damages should only be awarded in "egregious" cases and "must not be so great as to cripple the union financially and detract significantly from its ability to represent its members"); *Braswell*, 388 F.2d at 199-200 (allowing punitive damages where labor organization has acted with actual malice or reckless or wanton indifference to the rights of the aggrieved union member); *Morrissey*, 544 F.2d at 25 (same); *Cooke*, 529 F.2d at 820 (same); *Thompson*, 74 F.3d at 1509 (same); *Vandeventer*, 579 F.2d at 1380 (allowing punitive damages where evidence supported finding of malice); *Doty*, 908 F.2d at 1062 ("[I]t is clear that punitive damages are available to deter malicious violations of the LMRDA"). In the instant case, the Second Circuit affirmed the district court's finding that the jury properly awarded punitive damages.

CONCLUSION

There is no Circuit split on the issues raised in the petition, and the Second Circuit applied well-established legal principles in affirming the district court judgment. Certiorari is not warranted in this case.

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Respectfully submitted,

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